



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

June 28, 2013

OM 13-20

Ms. Patricia A. Morgan

RE: Morgan v. Foster Board of Canvassers

Dear Ms. Morgan:

The investigation into your Open Meetings Act ("OMA") complaint filed against the Foster Board of Canvassers ("Board") is complete. By correspondence dated February 11, 2013, you allege the Board violated the OMA when it elected a new Chairperson of the Board during its September 6, 2012 meeting without proper notice. You further allege the September 6, 2012 meeting was not properly posted and that prior to the meeting, members of the Board had discussions regarding the subject matter of the September 6, 2012 meeting outside the public purview.

In response to your complaint, we received a substantive response from the Board's legal counsel, Renee M. Bevilacqua, Esquire, who also provided affidavits from the Chair for the Foster Board of Canvassers, Mr. Robert A. DePalo, a member of the Foster Board of Canvassers, Ms. Cynthia Cardillo, and the clerk of the Town of Foster, Ms. Carol Lyons-Sholly. Attorney Bevilacqua states, in pertinent part:

"I questioned [Mr. DePalo] on the source of his knowledge, if any, of the Rules by which the Board should be organized or run. He related * * * that when he has a question he telephones the 'State Board of Elections' and someone there will generally direct him on how to proceed; that the Chair at that time, [Ms.] Pat Morgan, was unable or unwilling to answer questions or direct Board Members to the 'Rules' by which the Board should run. I raised this same question with Board Member [Ms.] Cynthia Cardillo. [Ms.] Cardillo responded that she was the newest Member and repeatedly questioned the Chair, [Ms.] Pat Morgan, for

direction on how the Board should be comprised and where to find 'the Rules' by which they must operate, to no avail. Ms. Cardillo relates that she 'finally did (her) own research' and showed me a copy of some of the '*Rules and Regulation for local canvassing Authorities – adopted by the State Board of Elections*' which she found. [Ms.] Cardillo further relates she depended on Foster Town Clerk Carol Sholly (in the adjoining office) to post a meeting properly. * * *

Neither [Mr.] DePalo nor [Ms.] Cardillo were informed of the Open Meetings Act or that information was available from the Attorney General's Office as to how it may affect their work/positions. The undersigned solicitor has informed them that the Board of Canvassers is a public body and the Open Meetings Act applies to them. I directed them to the Attorney General's website for substantive information and have discussed with the Town Clerk the need for a clerk to be assigned to Canvassing tasks, so as to prevent future OMA complaints.

All Board members and the Chair appear to have spent their time in the Canvasser's 'office' next to the Town Clerk doing ministerial work of this Board. The Members leave hand written notes to each other (which could be days or weeks apart) in the writing and response **and the notes are for the purpose of completing the ministerial duties of the Board.** (Emphasis in original).

The subject note of 08/29/2012 [Re: an Organizational Meeting,] if taken as a joint effort, even over time – based upon the 'we' language, only appears to be involving two topics, one: would each of the two undersigned Members be resigning from the Board []; and two: that [Ms. Cardillo], who left the note, then [Mr. DePalo] – who subsequently found and signed the 08/29/2012 note, **would like to call a meeting for the purpose of discussing and electing Officers,** the 'calling' of which necessarily is done prior to the public Notice. * * * It is significant to note that it appears from my questioning of [Mr.] DePalo and [Ms.] Cardillo that there were no regular meetings. (Emphasis in original).

In conclusion, no evidence discovered demonstrates action, discussion or vote by a Quorum of Board members on the substantive matter of adopting Rules or Election of officers took place. The discussion, action, or vote on any rules to be adopted is clearly subject matter for a future meeting and not being decided by this or any other communication."

Mr. DePalo states, in pertinent part:

"I am currently the Chair for the Foster Board of Canvassers.

Some time after 08/29/2012 I went to the Town Hall to work on behalf of the Board of Canvassers. As customary, on the desk were several correspondences

via hand written notes between the Board of Canvassers. Among them was a note from Board member [Ms.] Cynthia Cardillo to then Chairperson [Ms.] Patricia Morgan. * * *

I read, agreed with and signed the letter * * * signing above Ms. Cardillo's signature because I was a senior member. I left that note on the desk with other notes of my own.

On August 30, 2012, I received an email from the Town Clerk, [Ms] Carol Sholly notifying the Board of the scheduled Foster Board of Canvasser's meeting dated September 6, 2012. * * *

On August 31, 2012 I received another email from Town Clerk [Ms.] Carol Sholly notifying the Board of an amended agenda for the meeting scheduled for September 6, 2012. * * *

On September 6, 2012, I attended the scheduled Foster Board of Canvasser's meeting."¹

Ms. Cardillo states, in pertinent part:

"To the best of my knowledge, the Agenda for the September 6th Meeting of the Foster Board of Canvassers, was posted properly as prescribed by law. This was confirmed by Foster Town clerk, [Ms.] Carol Lyons Sholly verbally and in the form of an Email. * * *

There was no discussion outside the public purview in regards to the September 6th Meeting Agenda.

Due to the lack of leadership and organization in the Canvassers office, I inquired of the Town Clerk ([Ms.] Carol Sholly) what could be done. The Town Clerk informed me the Foster Board of Canvassers has not had an organizational meeting for some time.

Pursuant to the discussion with [Ms.] Carol Sholly, I researched the need of an organizational meeting and decided to inform [Ms.] Carol Sholly I would leave a

¹ Attached to Mr. DePalo's affidavit was a copy of a hand written note addressed to "Pat" dated August 29, 2012 signed by both Mr. DePalo and Ms. Cardillo with a "carbon copy" to the Foster Town Clerk. The contents of the note state, in pertinent part:

"We wish to call for a Board of Canvassers Annual Organizational/Election of Officers meeting as required. Please let us know which Wednesday is good for you."

note on the desk in the Canvassers for the rest of the Board of Canvassers members.

I did leave a signed note [] on the desk in the Board of Canvassers office, in which my concerns were addressed. I also expressed my opinion for the need of an Organizational meeting.

Upon my return to the Board of Canvassers office the following week, I observed the original note with my signature and the signature of another Board of Canvassers Member, [Mr.] Robert DePalo, [was] present.”

Ms. Carol Lyons Sholly states, in pertinent part:

“I am the person responsible for posting the agendas for the Foster Board of Canvassers Meetings to the Secretary of State’s web site.

On August 30, 2012, I posted a meeting for the Foster Board of Canvassers at 5:23 p.m. The meeting date and time was September 6, 2012, at 6:30 p.m., this was well ahead of the 48 hour notice required by the Open Meetings Law * * *

Also on August 30, 2012, at 5:33 p.m. I informed the Foster Board of Canvassers members by email that there was a meeting called for September 6, 2012. This email included [Ms.] Patricia Morgan. * * * At 7:13 p.m. she responded to that email which indicated to me that she had received this message and was properly notified. * * *

On August 31, 2012, at 1:13 p.m., I amended the posting to include meeting minutes from July 18, 2012, and July 20, 2012 * * *

I was asked to post this meeting by either [Mr.] Robert DePalo or [Ms.] Cynthia Cardillo. I do not remember now which person specifically gave me the date and time. I am not aware of discussions prior to this meeting between these two members of the Board of Canvassers as most communication took place by leaving work notes for one another.

Please be aware that Foster does not have a Canvassing Clerk and that the Board members must do all the paperwork themselves. To do so they leave notes regarding what work is completed and what work needs to be done, etc.”

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Board

violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The first issue for this Department to decide is whether the agenda item for the September 6, 2012 meeting was sufficient to inform the public of the nature of the business to be discussed. The agenda item at issue for the September 6, 2012 meeting stated, in pertinent part:

“Election of Officers”

The OMA requires that:

“Public bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date. This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed.” R.I. Gen. Laws § 42-46-6(b).

The Rhode Island Supreme Court examined this requirement in Tanner v. Town of East Greenwich, 880 A.2d 784 (R.I. 2005), wherein the Court held that the agenda must provide sufficient information to the public so that the citizenry may be informed as to what matters will be addressed at a meeting and the agenda must not be misleading. Id. at 797-98. The Court determined the appropriate inquiry is “whether the [public] notice provided by the [public body] fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted.” Id. at 797.

The Rhode Island Supreme Court, on April 2, 2013, re-examined the Tanner standard in Anolik v. Zoning Board of Review of the City of Newport, 2012-76-APPEAL, 2013 WL 1314947 (R.I., Apr. 2, 2013). The relevant facts of that case are as follows. In November of 2008, defendants received a letter from counsel for Congregation Jeshuat Israel requesting an extension of the time in which to substantially complete certain improvements to Congregation Jeshuat Israel’s property that had been approved by a previous zoning board decision. Id. at 2. That previous decision expressly contained a condition to the effect that there be substantial completion of the improvements within two years. Id. The agenda item for the February 23, 2009 meeting stated:

“IV. Communications:

Request for Extension from Turner Scott received 11/30/08 Re: Petition of Congregation Jeshuat Israel”

At the meeting, the board voted unanimously to approve the request for an extension of time which required that the “improvements must be started and [be] substantially complete [by] February 23, 2011.” Id. On August 21, 2009, the plaintiffs filed a complaint in Superior Court alleging that the agenda item violated the OMA because it was “a ‘vague and indefinite’ notice to the public and one lacking in specificity.” Id. The Superior Court granted defendants’ motion for summary judgment. Id. at 4. On appeal, the Supreme Court examined Tanner and noted that R.I. Gen. Laws § 42-46-6(b) requires the “public body to provide fair notice to the public under

the circumstance, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon.” *Id.* at 6-7 *quoting Tanner*, 880 A.2d at 797. The Court held that the agenda item was “completely silent as to which specific property was at issue; the agenda item provided no information as to a street address, a parcel or lot numbers, or even an identifying petition or case number.” *Id.* at 7. (Emphasis in original). The agenda item “fails to provide any information as to exactly what was the reason for the requested extension or what would be its duration.” *Id.* at 8.

In the instant case we conclude that the agenda item was sufficient to adequately inform the public of the nature of the business to be discussed. The agenda item informed the public that the Board was going to conduct an “[e]lection of officers.” Our review of the open session meeting minutes reveals that the Board did elect a Chairperson and a Secretary. Respectfully, we do not believe this agenda item was misleading. Based upon the evidence presented, and applying the above case-by-case analysis, this Department opines that the item listed on the agenda at issue adequately advised the public as to the nature of the business to be discussed. Consistent with Anolik, the OMA requires a statement specifying the “nature” of the business to be discussed, not a verbatim list of every potential aspect that might be discussed in relation to that topic. *See Guglielmo v. Scituate Town Council*, OM 11-34 (“[W]e do not find the posted agenda deficient because it failed to list the size of the proposed cemetery.”). We conclude that the February 21, 2013 meeting agenda was proper and met the Anolik standard. As such, the Board did not violate the OMA.

You also allege the September 6, 2012 meeting was not properly posted. The OMA provides a number of requirements to ensure that public meetings are open and accessible to the public. “Any citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general.” R.I. Gen. Laws § 42-46-8(a). In the Rhode Island Supreme Court opinion of Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Supreme Court examined the “aggrieved” provision of the OMA. In Graziano, an OMA lawsuit was filed concerning notice for the Lottery Commission’s March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. At the Lottery Commission’s March 25, 1996 meeting, Mr. Hawkins, as well as his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission’s notice was deficient, the trial justice determined that the Lottery Commission violated the OMA and an appeal ensued. On appeal, the Rhode Island Supreme Court found that it was “unnecessary” to address the merits of the OMA lawsuit because “the plaintiffs Graziano and Hawkins have no standing to raise this issue” since “both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice.” *Id.* at 221. The Court continued that it:

“has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting. * * * It is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect. While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue, no such contention has been set forth in the case at bar. The

burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice.” Id. at 221-22. (Emphasis added).

Here, pursuant to Graziano, you must demonstrate that you were “in some way disadvantaged or aggrieved by such defect” in the notice. Id. at 221. You have presented no evidence that you were aggrieved or in any way disadvantaged by this potential allegation. Here, a review of the evidence before us, including the meeting minutes, indicates that not only were you present at the September 6, 2012 Board meeting, you called the meeting to order, asked questions and voted at the meeting. For this reason, and in accordance with Graziano, we conclude that you were not “aggrieved” by this allegation and we do not address this issue.

Lastly, you allege discussions regarding the September 6, 2012 Board meeting occurred outside the public purview prior to the meeting. Respectfully, you have not presented this Department with any evidence that any discussions among Board members concerning public business occurred outside the public purview prior to the September 6, 2012 meeting. You suggest that prior discussions must have occurred based upon the existence of the hand written note signed by Mr. DePalo and Ms. Cardillo indicating the need for an Organizational/Election of Officers meeting. This handwritten note calling for a meeting, without additional evidence, does not implicate the OMA. If fact, the OMA states:

“[n]o meeting of members of a public body or use of electronic communications shall be used to circumvent the spirit or requirements of ... [the OMA]; provided, however, these meetings and discussions are not prohibited. Provided, further however, that discussions of a public body via electronic communication shall be permitted only to schedule a meeting.” R.I. Gen. Laws § 42-46-5(b). (Emphasis added).

The above provision expressly allows members of a public body to use electronic communications to discuss “schedul[ing] a meeting” outside the public purview and if a public body may use electronic communication to schedule a meeting, it can be reasonably inferred that a public body may also use non-electronic means (i.e. handwritten note) to schedule a meeting. It appears that was what done in this case, namely a note dated August 20, 2012 addressed to you and signed by Mr. DePalo and Ms. Cardillo requesting that you schedule a Board meeting. In accordance with R.I. Gen. Laws § 42-46-5(b) the use of this note and any attendant discussions related to scheduling a meeting did not violate the OMA. Respectfully, you have presented no evidence that any further discussions outside the public purview occurred prior to the September 6, 2012 and Ms. Cardillo’s affidavit expressly denies that any such discussions occurred. Accordingly, we find no violation.

Although this Department has found no violations, nothing within the OMA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 42-46-8(c). The OMA allows the complainant to file a complaint within ninety (90) days from the date of the Attorney General’s closing of the complaint or within one hundred eighty (180) days of the alleged violation,

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whichever occurs later. See id. Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in black ink, reading "Lisa Pinsonneault". The signature is fluid and cursive, with the first name "Lisa" and last name "Pinsonneault" clearly legible.

Lisa Pinsonneault

Special Assistant Attorney General

Extension 2297

LP/pl

Cc: Renee Bevilacqua, Esq.